90-1972

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In the Supreme Court of the United States

OCTOBER TERM, 1990

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN R. WILLIAMS, JR.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

MICHAEL R. DREEBEN
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether an indictment may be dismissed because the government failed to present exculpatory evidence to the grand jury.

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-15a) is reported at 899 F.2d 898. The orders of the district court (App., *infra*, 16a-18a, 19a-26a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 20, 1990. Petitions for rehearing were denied on April 22, 1991. App., *infra*, 27a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment provides in pertinent part:

> No person shall be held to answer for a * * * crime, unless on a presentment or indictment of a Grand Jury * * *.

STATEMENT

1. Between September 1984 and November 1985, respondent obtained loans and renewals of loans from several banks in Tulsa, Oklahoma. In applying for those loans, respondent provided the banks with two types of financial statements. One statement, called a "Market Value Balance Sheet," included a list of respondent's "current assets." In financial statements, current assets are generally understood to be cash or assets that can be converted to cash within one year. Respondent's list of current assets contained a group of "notes receivable"; included in the list were notes totalling between $5 million and $6 million reflecting loans that respondent had made to three venture capital companies. Although respondent's balance sheet did not disclose the fact, each of the venture companies was relatively new and had a negative net worth at the time the statements were submitted to the banks; the value of those notes was therefore questionable. App., *infra*, 2a.

The second financial document used by respondent was a "Statement of Projected Income and Expense." It listed as a source of income for respondent the interest that was payable on the venture capital notes described above. Because of the precarious financial condition of the venture companies, no interest could be paid on the notes apart from the funds generated from respondent's own loans to the companies. Respondent's financial statements, however, failed to indicate that the interest income did not derive from an independent outside source, but came from the funds that he himself had invested in the venture companies. App., *infra*, 2a-3a.

2. On May 4, 1988, a grand jury sitting in the United States District Court for the Northern District of Oklahoma returned a seven-count indictment against respondent. The indictment charged respondent with knowingly making false statements to federally insured banks for the purpose of influencing the banks to extend loans, in violation of 18 U.S.C. 1014. The allegedly false oral and written statements related to respondent's overvaluation of the notes receivable in his current assets, and the overvaluation of his interest income in his projected income statement. App., *infra*, 3a.

After receiving portions of the grand jury transcript in discovery, respondent moved to dismiss the indictment on the ground that the government had failed to present "substantial exculpatory evidence" to the grand jury as required by *United States* v. *Page*, 808 F.2d 723, 728 (10th Cir.), cert. denied, 482 U.S. 918 (1987). Respondent claimed that his ledgers, tax returns, and other financial records were in the government's possession, but had been withheld from the grand jury. Respondent's theory was that those documents were exculpatory because they revealed that he and his accountants had consistently treated the notes receivable and interest income in the same manner as they had been treated in the presentations to the banks. Respondent also asserted that the government had in its possession and should have presented to the grand jury a five-volume transcript of his deposition, given in a bankruptcy proceeding, in which he explained his methods of ac-

counting and financial reporting in a fashion that he claimed exonerated him. App., *infra*, 3a-4a.

The district court initially denied respondent's motion, concluding that "there has been no substantial exclusion of exculpatory evidence from the purview of the Grand Jury." App., *infra*, 17a. Although stating that certain "potentially" exculpatory evidence had not been presented to the grand jury, the court found that that information did not rise to the threshold set by *Page*, because a prosecutor is not obligated "to 'ferret out and present every bit of potentially exculpatory evidence.'" *Ibid.*, citing *Page*, 808 F.2d at 728.

On reconsideration, however, the court reversed itself and dismissed the indictment. The court stated that two categories of evidence in the government's possession constituted "substantial exculpatory evidence" that had been withheld from the grand jury: (1) the bankruptcy deposition, in which respondent explained his financial accounting methods, and (2) various financial statements, tax records, accounting ledgers, and other documents prepared by respondent and his accountants. App., *infra*, 23a. As the court saw it, that evidence was germane to respondent's "intent to make materially false statements upon which the banks would rely," and was "substantially exculpatory." *Id.* at 24a.

The court then applied this Court's decision in *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 256 (1988), under which an indictment may be dismissed for prosecutorial misconduct only if "'the violation substantially influenced the grand jury's decision to indict,' or if there is 'grave doubt' that the decision to indict was free from the substantial influence of such violations." Examining the facts under the *Bank of Nova Scotia* test, the district court concluded that the withheld information "raises reasonable doubt about [respondent's] intent to defraud," such that the grand jury's decision to indict was "gravely suspect." App., *infra*, 26a. Accordingly, the court dismissed the indictment without prejudice. *Ibid.*

3. The court of appeals affirmed. Citing its decision in *Page*, the court declared that "a prosecutor has the duty to present substantial exculpatory evidence to the grand jury." App., *infra*, 5a. The court treated the district court's determination that the government had withheld exculpatory evidence as a finding of fact, and it concluded that the district court's ruling was not clearly erroneous. *Id.* at 4a-5a, 7a-11a.

As to the bankruptcy deposition, the court of appeals found that although respondent's explanations of his accounting methods "may seem irrelevant and self-serving under the government's theory of the case, the grand jury must receive any information that is relevant to any reasonable theory it may adopt." App., *infra*, 8a. In this case, the court stated, the grand jury could reasonably have accepted a different view of respondent's definition of "current assets" than that offered by the government; if it had, respondent's explanations of his accounting methods "would have been relevant" in tending to establish that he lacked an intent to defraud the banks. *Id.* at 8a-9a.

As to respondent's financial records, the court noted that respondent had consistently reported his income and expenses in the same way that he had presented them to the banks. The court also observed that the grand jury could have concluded that re-

spondent's financial statements put the banks on notice that respondent used an unconventional method to account for his current assets. App., *infra*, 9a-10a. In light of those factors, the court concluded that the withheld evidence was "consistent with the possible theory that [respondent] simply did not intend to mislead the banks." *Id.* at 11a. It therefore upheld the district court's characterization of the withheld information as exculpatory.[1] *Ibid.*

The court also upheld the district court's determination that the absence of this evidence rendered the indictment vulnerable to dismissal under the *Bank of Nova Scotia* standard. The court explained that "the purpose of the grand jury is to render an unbiased, independent, and informed decision based on all relevant evidence"; the "government's theory of the case is not critical." App., *infra*, 14a. Reasoning that "[t]he finding of intent to commit a criminal act is a determination the grand jury must make in deciding whether probable cause exists," the court sustained the district court's ruling that "the failure to present evidence relevant to the critical issue of intent rendered the indictment suspect," *ibid.*, and justified the dismissal of the indictment without prejudice, *id.* at 14a-15a.

[1] In addition to arguing that the withheld information was not exculpatory, the government contended that its witnesses had in fact put before the grand jury the substance of the information discussed by the court. The court of appeals declined to decide that issue, however, stating that "the government did not designate the grand jury transcript as a part of the record before us." App., *infra*, 11a. On rehearing, the government explained that the grand jury transcripts had in fact been designated as part of the record, and that it was only because of an error by the district court clerk that the transcripts had not been transmitted to the Tenth Circuit. The government urged the panel to reconsider its holding in light of the transcripts. Gov't C.A. Pet. for Rehearing at 4. The panel, however, denied rehearing. App., *infra*, 27a-28a. For purposes of this petition, we assume that the grand jury did not actually receive the information that the court of appeals found to be exculpatory in this case.

REASONS FOR GRANTING THE PETITION

The court of appeals held that an indictment may be dismissed when the government has in its possession, but fails to present to a grand jury, evidence that is deemed "exculpatory" because it is consistent with a possible theory of defense. That holding squarely conflicts with decisions of other courts of appeals, which have held that a prosecutor has no duty to present exculpatory evidence to the grand jury. It also conflicts with basic principles governing the function of a grand jury and threatens to cause practical problems for courts and prosecutors. In hindsight, defendants can easily identify some arguably exculpatory evidence that the prosecutor did not present to the grand jury. If the decision below is allowed to stand, courts will be required to adjudicate those highly factual issues before trial, and prosecutors will have to expand their grand jury presentations to avert possible avenues of challenge. The decision below therefore constitutes a substantial source of potential delay and disruption in the criminal process. Because the question whether a prosecutor has any duty to present exculpatory evidence to a grand jury is a recurring issue on which the circuits are divided, and because the correct resolution of that question is of importance to the criminal justice system, this Court's review is warranted.

1. The Tenth Circuit's holding that a prosecutor has a duty to disclose exculpatory evidence to a

grand jury conflicts with the holdings of at least five other circuits. The First, Sixth, Eighth, Ninth, and Eleventh Circuits have all ruled that a prosecutor has no obligation to present exculpatory evidence to a grand jury. See *United States* v. *Rivera-Santiago*, 872 F.2d 1073, 1087 (1st Cir.) (prosecutor is neither required "to disclose exculpatory evidence" to a grand jury, nor "to impeach the credibility of his own witnesses"), cert. denied, 492 U.S. 910 (1989); *United States* v. *LaTorre*, 922 F.2d 1, 7 (1st Cir. 1990) (same); *United States* v. *Adamo*, 742 F.2d 927, 937 (6th Cir. 1984) ("A federal prosecutor is not obligated to present exculpatory evidence to the grand jury."); *United States* v. *Vincent*, 901 F.2d 97, 99 (8th Cir. 1990) ("The government is 'normally not under a duty to disclose exculpatory evidence to the grand jury.'"); *United States* v. *Larrazolo*, 869 F.2d 1354, 1359 (9th Cir. 1989) ("Ninth Circuit precedent does not impose an affirmative duty on the prosecutor to present exculpatory evidence * * *. 'The prosecutor has no duty to present to the grand jury all matters bearing on the credibility of witnesses *or any exculpatory evidence*.'"); *United States* v. *McClintock*, 748 F.2d 1278, 1285 n.3 (9th Cir. 1984) ("We reject any argument that the indictment should be dismissed for failure of the prosecutor to present exculpatory material to the grand jury. The prosecutor has no such legal obligation."), cert. denied, 474 U.S. 822 (1985); *United States* v. *Hawkins*, 765 F.2d 1482, 1488 (11th Cir. 1985) ("The government is not obligated to present exculpatory evidence to a grand jury."), cert. denied, 474 U.S. 1103 (1986).[2]

[2] The Third Circuit has not reached a settled conclusion on the existence or extent of any duty to present exculpatory evidence. See *United States* v. *Ismaili*, 828 F.2d 153, 165 n.13 (3d Cir. 1987) (leaving the issue open), cert. denied, 485 U.S. 935 (1988); cf. *Hochman* v. *Rafferty*, 831 F.2d 1199, 1204 (3d Cir. 1987) (no due process violation to omit credibility evidence because it was not "clearly exculpatory"), cert. denied, 485 U.S. 1022 (1988).

In *United States* v. *Page*, the Tenth Circuit explicitly broke with that line of authority to join those circuits it perceived as imposing the duty on a prosecutor to disclose exculpatory evidence to the grand jury. *Page* began by stating that "[t]here are two views concerning the duty of a prosecutor to present exculpatory evidence to a grand jury." 808 F.2d at 727. While noting that several decisions have rejected such a duty, it read decisions from the Second[3] and Seventh[4] Circuits as "suggest[ing] that,

[3] *United States* v. *Ciambrone*, 601 F.2d 616, 622-623 (1979). In *Ciambrone*, the court stated that "where a prosecutor is aware of any substantial evidence negating guilt he should, in the interest of justice, make it known to the grand jury, at least where it might reasonably be expected to lead the jury not to indict." *Id.* at 623. Subsequent Second Circuit cases have echoed that view. See *United States* v. *Casamento*, 887 F.2d 1141, 1183 (1989) ("[A] prosecutor should present exculpatory evidence where such evidence is 'substantial' and 'where it might reasonably be expected to lead the jury not to indict.'"), cert. denied, 493 U.S. 1081 (1990). No Second Circuit decision, however, has reversed a conviction or dismissed an indictment based on the principle discussed in *Ciambrone*.

[4] *United States* v. *Flomenhoft*, 714 F.2d 708, 712 (1983), cert. denied, 465 U.S. 1068 (1984). In *Flomenhoft*, the court rejected a claim that the government had failed to present exculpatory evidence to the grand jury, but cited with apparent approval a district court's statement that "while prosecutors need not present to the grand jury all circumstances which might be considered exculpatory, they must present evidence which clearly negates the target's guilt." *Id.* at 712,

although a prosecutor need not present all conceivably exculpatory evidence to the grand jury, it must present evidence that clearly negates guilt." *Ibid.* The court then adopted the latter rule, holding that "when *substantial* exculpatory evidence is discovered in the course of an investigation, it must be revealed to the grand jury." *Id.* at 728. The court justified its rule by stating that it promotes "judicial economy," because "[i]f a fully informed grand jury cannot find probable cause to indict, there is little chance the prosecution could have proved guilt beyond a reasonable doubt to a fully informed petit jury." *Ibid.*

Although the court in *Page* qualified its holding by stating that a prosecutor need not "ferret out and present every bit of potentially exculpatory evidence," 808 F.2d at 728, the decision in this case demonstrates the reach of the *Page* principle and the extent of its departure from the rule in other circuits. Here, in applying *Page*, the Tenth Circuit concluded that "the grand jury must receive any information that is relevant to any reasonable theory it may adopt." App., *infra*, 8a. In light of that principle, the court concluded that certain financial records and a deposition transcript of respondent should have been submitted to the grand jury because they were "consistent with [a] possible theory" of defense regarding respondent's lack of fraudulent intent. *Id.* at 11a. That rule puts the daunting burden on a prosecutor to anticipate a defendant's possible trial defenses, discover whether any information in the prosecutor's possession is "consistent" with those

quoting *United States* v. *Dorfman*, 532 F. Supp. 1118, 1133 (N.D. Ill. 1981). No Seventh Circuit decision has reversed a conviction or dismissed an indictment based on the principle discussed in *Flomenhoft*.

defenses, and then consume whatever of the grand jury's time is necessary to present such "exculpatory" evidence.[5]

The burden is particularly acute in complex cases involving extensive documentary evidence. Any number of documents may contain some evidence or be subject to some interpretation that is consistent with a defendant's possible theory of defense, but it is often far from obvious how the documentary evidence supports that theory. The problem is exacerbated when, as is often the case, the evidence in dispute bears on the gray area of intent. In contrast to the decision below, no other court of appeals has imposed such a burdensome requirement on the prosecutor's relationship to the grand jury.[6]

2. The Tenth Circuit's requirement that a prosecutor must disclose known exculpatory evidence to

[5] Since the decision in this case, the Tenth Circuit has ruled that *Page* does not require that a prosecutor reveal the criminal history of a particular witness to the grand jury because that is "not evidence which would have negated [the] defendant's guilt." *United States* v. *Reid*, 911 F.2d 1456, 1460 (1990), cert. denied, 111 S. Ct. 990 (1991). Nothing in *Reid*, however, signals a retreat from the rule announced here and in *Page* that authorizes courts to review the record of the presentation before the grand jury to determine whether exculpatory evidence of some kind has been withheld from the grand jury.

[6] Commentators have recognized that the "federal courts [are] sharply divided" with respect to whether "the prosecutor's failure to present known exculpatory evidence will constitute sufficient grounds to dismiss an indictment." 2 W. LaFave & J. Israel, *Criminal Procedure* § 15.4, at 92 & n.78.1 (Supp. 1990) (citing cases illustrating the circuit split). See also P. Diamond, *Federal Grand Jury Practice and Procedure* § 9.04, at 346 (1990) (noting that "the circuits disagree on th[e] subject" of whether there is a duty to present exculpatory evidence).

the grand jury is unfounded. It is well established that an indictment may not be challenged on the ground that the evidence before the grand jury was inadequate or incompetent, *Costello* v. *United States*, 350 U.S. 359 (1956); was obtained in violation of the Fourth Amendment, *United States* v. *Calandra*, 414 U.S. 338 (1974); or was obtained in violation of the privilege against compulsory self-incrimination, *Lawn* v. *United States*, 355 U.S. 339 (1958). For several reasons, the principles that underlie those holdings cannot be squared with a rule that courts may dismiss indictments based on the prosecutor's failure to present exculpatory evidence to the grand jury. They are particularly incompatible with the Tenth Circuit's requirement that "the grand jury must receive any information that is relevant to any reasonable theory it may adopt." App., *infra*, 8a.

First, the grand jury's function is to determine whether probable cause exists; a grand jury proceeding is "not an adversary hearing in which the guilt or innocence of the accused is adjudicated." *Calandra*, 414 U.S. at 343; *Branzburg* v. *Hayes*, 408 U.S. 665, 686-687 (1972). The grand jury proceeds *ex parte*, has essentially investigative functions, and does not render final judgments. Potential targets do not have a right to appear before the grand jury, to cross-examine witnesses, or to present evidence in support of their theory of the case. And unlike the verdict of a petit jury, which must be the product of a unanimous finding of guilt beyond a reasonable doubt, an indictment may be returned if a bare majority of the grand jurors find probable cause. See Fed. R. Crim. P. 6(a) and (f). Because of the nature of the grand jury's functions, the grand jury cannot and need not explore all possible trial defenses, or even all substantial ones, before determining whether to indict. The time for adjudicating the defendant's defenses is at trial, in accordance with the constitutionally required safeguards that attend the trial process.

Second, it would greatly obstruct the grand jury's proceedings to permit judicial oversight of whether a prosecutor withheld exculpatory evidence. Not only would the litigation of such motions compromise grand jury secrecy in many cases, it also would require courts to hold "preliminary trials on the merits," *Calandra*, 414 U.S. at 350. "Any holding that would saddle a grand jury with minitrials and preliminary showings would assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws." *United States* v. *Dionisio*, 410 U.S. 1, 17 (1973); see also *United States* v. *R. Enterprises, Inc.*, 111 S.Ct. 722, 726-727 (1991).

Third, requiring courts to conduct pretrial proceedings to determine whether prosecutors had withheld exculpatory evidence from the grand jury would impose significant and unjustified costs on the criminal justice system. At the grand jury stage, it is often difficult for a prosecutor to predict whether a court will later view a particular item of evidence as "substantially exculpatory." Defenses have not been presented or fleshed out, and there is no formal adversary process to facilitate their development. Prosecutors would therefore be compelled, upon pain of dismissal of the indictment, to anticipate what evidence might be deemed, as the Tenth Circuit put it, "consistent with [a] possible theory" of defense that may surface later in the proceedings. App., *infra*, 11a. The inevitable result would be to pro-

long and complicate grand jury proceedings. And dismissing an indictment, so that the prosecutor would have to re-present the case by including evidence the court considered exculpatory, would impose additional costs and delays and inevitably provoke further dispute about the adequacy of the prosecutor's representation.[7]

The court of appeals ignored those costs in reasoning that its rule would "promote[] judicial economy"; the court surmised that if a fully informed grand jury could not find probable cause, then the petit jury would be unlikely to convict under the higher standard of proof that applies at trial. App., *infra*, 5a, quoting *Page*, 808 F.2d at 728. But that argument relies on a perception of judicial economy that is largely illusory. The prosecution has ample incentive not to seek an indictment when the chances of a conviction based on a full record are remote; "[f]or the most part, a prosecutor would be unlikely to request an indictment where a conviction could

[7] The grand jury is constituted as a body of independent citizens because of its "dual function of determining whether there is probable cause to believe that a crime has been committed and of protecting citizens against unfounded criminal prosecutions." *Branzburg* v. *Hayes*, 408 U.S. 665, 686 (1972); see *Butterworth* v. *Smith*, 110 S. Ct. 1376, 1380 (1990). But if courts routinely entertained attacks on omissions of possible defense evidence, it would quickly lead to a level of judicial scrutiny that would undermine the grand jury's independence, for, as one court has noted, "a court that dismisses a validly returned indictment is more guilty of interfering with the independence of the grand jury than a prosecutor who presents a slanted case to the grand jury." *United States* v. *Udziela*, 671 F.2d 995, 1001 n.3 (7th Cir. 1982) (quoting Note, *Grand Jury: A Prosecutor Need Not Present Exculpatory Evidence*, 38 Wash. & Lee L. Rev. 110, 117 (1981)), cert. denied, 457 U.S. 1135 (1982).

not be obtained." *Calandra*, 414 U.S. at 351. Because of the difficulty of assessing the exculpatory value of particular evidence at the grand jury stage, the process of judicial review of the presentations made to grand juries will be burdensome and will likely result in frequent errors. Even if the courts could correctly identify those few cases in which the withheld exculpatory evidence is so powerful that it would likely motivate a grand jury not to indict, it is certain that the courts would spend far more time reviewing meritless claims raised by creative defendants seeking to put the prosecutor on trial for conduct before the grand jury. Any benefits that would flow from that regime would come at far too high a cost.[8]

3. The court of appeals' decision has significant practical ramifications. If allowed to stand, the decision would have a substantial and troubling impact on criminal prosecutions in the Tenth Circuit. The decision below provides fertile grounds for defendants to create delay and distraction at the pretrial stage.

[8] This is not to say that prosecutors should not make fair and even-handed presentations to grand juries. The failure to do so is contrary to Department of Justice policy, which provides that

> when a prosecutor conducting a grand jury inquiry is personally aware of substantial evidence which directly negates the guilt of a subject of the investigation, the prosecutor must present or otherwise disclose such evidence to the grand jury before seeking an indictment against such a person.

United States Attorneys' Manual ¶ 9-11.233, at 15 (1988). That a practice represents sound prosecution policy, however, does not mean that it is compelled by the Constitution, cf. *Mu'min* v. *Virginia*, No. 90-5193 (May 30, 1991), slip op. 9, or that its violation is a proper basis for dismissal of an indictment.

It also forces prosecutors needlessly to prolong their grand jury presentations; it imposes on courts the burden of sorting out whether particular items of evidence are sufficiently exculpatory; and it invites preliminary judicial proceedings that inevitably will compromise the integrity and secrecy of the grand jury process.

The rule will particularly impede white-collar criminal investigations, which frequently generate thousands of documents that could support a myriad of possible theories of defense. Those defenses emerge and crystallize long after the investigative phase of a case. A duty to present "exculpatory" evidence relevant to a "possible" theory of defense in that situation confronts the prosecutor with the dilemma of presenting all conceivable evidence that may support some hypothetical defense, or risking protracted pretrial litigation that will scrutinize the grand jury record and that could result in dismissal of the indictment.

This case well illustrates the mischief that is inherent in the court of appeals' rule. The indictment in this case charged fraud in respondent's use of false financial statements to obtain loans from banks. Respondent, of course, was not compelled to divulge his defense to the allegations prior to the issuance of the indictment. Yet the court of appeals concluded that particular financial documents and information not given to the grand jury could be read as giving rise to a reasonable doubt that respondent had fraudulent intent. It may well be that this evidence was "consistent with [a] possible defense"; after all, the range of evidence that can support defenses going to intent is quite wide. Cf. *Cheek* v. *United States*, 111 S. Ct. 604, 611 (1991). But the question whether

particular evidence of intent is exculpatory or not should be reserved for the finder of fact at trial; it is not an issue that should be decided by a court as a matter of law, and certainly not on the necessarily incomplete record that typically accompanies a pretrial proceeding.

Under the court of appeals' ruling in this case, prosecutors must guess what defenses might be raised and must find all evidence in their files that is consistent with those defenses. Otherwise, a district court may later decide that the prosecutor failed to ensure that the grand jury "receive[d] any information that is relevant to any reasonable theory it may adopt." App., *infra*, 8a. Because of the widespread and harmful consequences that such a rule would impose on the administration of criminal justice and because of the division in the circuits on the validity of such a rule, this Court's review is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

MICHAEL R. DREEBEN
Assistant to the Solicitor General

JUNE 1991

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 88-2827, 88-2843

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLANT-CROSS-APPELLEE

v.

JOHN H. WILLIAMS, JR.,
DEFENDANT-APPELLEE-CROSS-APPELLANT

March 20, 1990

Before McKAY, SEYMOUR, and MOORE, Circuit Judges.

McKAY, Circuit Judge.

In this case, the trial court dismissed, without prejudice, a seven count bank fraud indictment after concluding that the government wrongfully withheld from the grand jury information that was substantially exculpatory. The court held that the government's failure to disclose the exculpatory evidence rendered the grand jury's decision to indict "gravely suspect." The government appeals.

I. FACTS

Defendant John H. Williams, Jr. is a businessman in Tulsa, Oklahoma. Between September 1984 and November 1985 defendant obtained loans and loan renewals from several banks in Tulsa. With each loan or renewal request, defendant presented the banks with two types of financial statements. The first type of financial statement, referred to as a "Market Value Balance Sheet," contained a category of assets called "Current Assets." The label "current assets" is a term commonly used to describe assets that will be realized in cash within one year, such as a receivable whose due date falls within the next twelve months. At the center of this case is a series of "Notes Receivable" that defendant listed under the "Current Assets" section of his "Market Value Balance Sheet." The "Notes Receivable" included notes amounting to between $5 million and $6 million receivable by defendant from several companies in which defendant had invested. Each of the companies was a relatively new venture with negative net worth. Thus, the government claimed that the classification of the notes as "current assets" was misleading because the poor financial condition of the debtor companies rendered the notes uncollectible in the short term.

The other type of financial disclosure at issue was contained in defendant's "Statement of Projected Income and Expense." One source of income listed on this statement was interest income payable on the notes receivable discussed above. The government alleged that due to the poor financial condition of the debtor companies, any interest accruing on the notes could only be paid to defendant with money loaned to the companies by defendant himself. Thus, according to the government, the disclosure of interest income was misleading because banks were likely to believe that the interest was a source of outside income to defendant.

After a six-month investigation, defendant was indicted for defrauding a bank in violation of 18 U.S.C. § 1014 (1982). The indictment charged defendant with seven counts of alleged material false statements and the willful overvaluation of notes, assets, and interest income. Defendant then filed a motion to compel the government to disclose any evidence that tended to exculpate defendant. In response, the government indicated it would comply with its continuing duty under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), by providing any exculpatory evidence. At the hearing on defendant's motion, defendant claimed there was a discovery dispute because the government had not provided any *Brady* material. The government, after being ordered to provide any exculpatory material, agreed to provide defendant with edited portions of the grand jury transcript and to submit the unedited transcript to the court.

After reviewing the grand jury transcript, defendant filed a motion to dismiss the indictment, claiming that the grand jury's decision to indict was suspect because "the Government failed to present substantial exculpatory evidence to the Grand Jury." Record, vol. 1, Doc. 46. The evidence on which defendant based his argument consisted of defendant's ledgers, tax returns, and financial statements, all of which tended to show that defendant had consistently accounted for the notes receivable and interest the same way he presented them to the banks. In addition to the financial records, defendant claimed that the government had in its possession, but failed to produce,

a five-volume deposition given by defendant in an earlier bankruptcy proceeding. According to defendant, the deposition testimony contained explanations of defendant's methods of accounting and financial reporting that would have exonerated him. After a hearing, the district court denied defendant's motion.

Subsequently, a hearing was held on several pretrial motions, at which time defendant entered a motion to reconsider the earlier motion to dismiss the indictment. On reconsideration, the court found that the government had possessed substantially exculpatory information that was not presented to the grand jury. The court stated that the evidence "raises reasonable doubt about the defendant's intent to defraud," because it "indicate[s] a lawful basis for the information provided to the banks." Record, vol. 1, Doc. 85, Order, November 7, 1988, at 8. The court held that the absence of this evidence rendered the grand jury's indictment "gravely suspect" and dismissed the indictment without prejudice. *Id.* at 8-9.

The government appeals from the district court's finding that the government withheld substantially exculpatory evidence from the grand jury. In the alternative, the government argues that the remedy of dismissal was inappropriate. Defendant agrees with the district court's dismissal, but claims that the indictment should have been dismissed with prejudice.

II. DISCUSSION

A. Exculpatory Evidence

The district court's finding that the government withheld exculpatory evidence is a finding of fact. "Questions of fact are reviewed under the deferential, 'clearly erroneous' standard as set forth in Fed.

R.Civ.P. 52(a). Although the standard is a rule of civil procedure, it is applied to certain issues in criminal proceedings." *United States v. Ortiz*, 804 F.2d 1161, 1164 n. 2 (10th Cir.1986).

> If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.

Lone Star Steel Co. v. United Mine Workers, 851 F.2d 1239, 1242 (10th Cir. 1988).

We have previously held that a prosecutor has the duty to present substantial exculpatory evidence to the grand jury. *See United States v. Page*, 808 F.2d 723, 728 (10th Cir.1987). Although we do not require the prosecutor to "ferret out and present every bit of potentially exculpatory evidence," *id.*, we do require that substantial exculpatory evidence discovered during the course of an investigation be revealed to the grand jury. *Id.* Other courts have also recognized that such a duty exists. *See, e.g., United States v. Flomenhoft*, 714 F.2d 708, 712 (7th Cir. 1983), *cert. denied*, 465 U.S. 1068, 104 S.Ct. 1420, 79 L.Ed.2d 745 (1984); *United States v. Ciambrone*, 601 F.2d 616, 622-23 (2d Cir.1979); *United States v. Phillips Petroleum Co.*, 435 F.Supp. 610, 620 (N.D.Okla.1977). This requirement promotes judicial economy because "[i]f a fully informed grand jury cannot find probable cause to indict, there is little chance the prosecution could have proved guilt beyond a reasonable doubt to a fully informed petit jury." *Page*, 808 F.2d at 728.

The indictment contains seven counts alleging bank fraud against the defendant under 18 U.S.C. § 1014 (1988). Section 1014 makes it a crime for someone knowingly to make a false statement concerning a material fact to a financial institution for the purpose of influencing the financial institution's action. The substance of the indictment alleges that defendant knowingly overvalued his current assets to obtain approval and renewals of various loans. Although count two involves oral representations, all of the offenses charged allege that overvaluations were made by the defendant in his financial statements, income statements, or projected income statements. The overvaluations alleged by the government concern the value and/or classification of income (including interest income), collateral, and notes receivable.

One essential element of the offense for which defendant was indicted is the intent to influence the bank's action by the use of a false statement. *See United States v. Smith*, 838 F.2d 436, 439-40 (10th Cir.1988); *United States v. Bonnette*, 663 F.2d 495, 497 (4th Cir. 1981), *cert. denied*, 455 U.S. 851, 102 S.Ct. 1456, 71 L.Ed.2d 666 (1982). Although we recognize the burden of proof for conviction at trial is greater than the finding of probable cause by the grand jury, the presentation of the government's case to the grand jury must be based upon the essential elements of the offense.

The government argued below and on appeal that "under its theory" of the case, it presented all relevant evidence. The government claims that because the tax returns, general ledgers and depositions were not relevant, they cannot be considered exculpatory. The district court found that this evidence was substantially exculpatory because it supported a lawful basis for the information provided as opposed to the intent to defraud. In so doing, the district court separated the withheld evidence into two categories as follows:

> (1) written material generated in the bankruptcy proceedings involving defendant and his wife. This material included defendant's deposition in bankruptcy adversary proceedings in which he explains his balance sheet, income statement, the method of their preparation, and his beliefs regarding asset values assigned, as well as a discussion by the defendant of his venture capital investments and statements to bankers regarding those investments; and (2) financial statements, tax records, and general records of the Defendant prepared by Defendant and his accounting firm over a period of years.

Record, vol. 1, Doc. 85, Order, November 7, 1988, at 5-6. We now discuss the district court's findings with respect to each category.

1. *Bankruptcy Materials*

The government subpoenaed certain written materials generated in an adversary bankruptcy proceeding, including a deposition of defendant. Defendant claimed that the deposition contained exculpatory material and that it should have been presented to the grand jury. Further, because the government submitted a proposed designation of certain testimony from the deposition for use at trial, defendant argues that the government conceded that the deposition was relevant. The government argued, however, that the deposition testimony was self-serving and irrelevant, and therefore it could not be considered substantially exculpatory.

After reviewing the material generated in the bankruptcy proceedings the District Court stated:

> An examination of Defendant's deposition and the exhibits to the deposition reveals substantial exculpatory material. The Defendant explains his balance sheets and income statements in detail, the method of their preparation, and his beliefs with regard to the asset values assigned. The deposition also contains significant discussion by Defendant of his venture capital investments and statements made to banks regarding those investments. Without the benefit of Defendant's testimony before the grand jury this written material would be highly useful to the grand jury in evaluating Defendant's intent.

Record, vol. 1, Doc. 85, Order, November 7, 1988, at 85. In holding the bankruptcy deposition should have been presented to the grand jury, the court recognized a distinction between "calling a target of a grand jury investigation," which often results in self-serving statements, and "presenting sworn testimony on the issues presented to the grand jury when that sworn testimony is available." Record, vol. 6, at 4. In our review of defendant's deposition we found explanations regarding the accounting methods used to prepare the financial statements. Although these explanations may seem irrelevant and self-serving under the government's theory of the case, the grand jury must receive any information that is relevant to any reasonable theory it may adopt. For example, it would have been reasonable in this case for the grand jury to adopt a theory under which defendant contemplated a different definition of "current assets" than the government. Under such a theory, defendant's explanations would have been relevant in

that they would tend to show that defendant did not intend to influence the bank's actions. We conclude, therefore, that the district court was not clearly in error when it found that the deposition testimony was exculpatory.

2. *Financial Records*

The government subpoenaed the general ledgers and tax records covering the years 1984 and 1985 from defendant's accounting firm. While urging the court to reconsider the motion to dismiss, defendant argued that the general ledgers "prove up item by item the statement of income/expense just like the tax returns did," therefore the consistency in reporting his financial condition negated the defendant's intent to defraud. Record, vol. 5, at 138. Defendant contended, therefore, that the general ledgers were exculpatory evidence and that the government's withholding of these documents affected the grand jury's decision to indict. *Id.*

After reviewing the general ledgers, tax records and financial statements the district court stated:

> The statements as to income and expenses on the financial statements at issue in the indictment were drawn from these ledgers, which were also used to prepare Defendant's tax returns. This written material reveals a consistent format of reporting over a period of years and consistency in the figures reported from form to form. If the government had presented to the grand jury this information within its possession, the grand jury would have been aware that the Defendant's inclusion of interest income on the financial statements at issue were consistent with the general ledgers maintained by [the accounting firm]

> with Defendant's federal income tax returns and with Defendant's bank statements. Likewise, the grand jury would have been aware that the Defendant, with the assistance of [the accounting firm], presented figures as to note balances which comprise the notes receivable portion of the financial statements that was consistent with the face value of the notes of the general ledgers.

Record, vol. 1, Doc. 85, Order, November 7, 1988, at 7-8. We have examined the financial statements that formed the basis of the indictment. These financial statements contain a legend at the bottom of the first page of each particular document. The legend is noted by an asterisk that reads: "Marketable securities and certain investments have been adjusted to reflect fair market on (date of statement). All other assets are reflected at cost or other tax basis." Record, vol. 2, at Exhibits A, B, and C. The particular current assets that the government alleges were knowingly overvalued did not contain the asterisk legend. Therefore, the reader of the financial statements would be aware that the value for income, collateral, and notes receivable were at cost or other tax basis. In addition, the legend put the banks on notice that defendant's financial statements were not prepared in accordance with Generally Accepted Accounting Principles. Thus, a grand jury could reasonably conclude that: (1) defendant understood a different meaning of "current assets" than the government or the banks; and (2) because of the different meanings of "current assets" contemplated by the parties, defendant likely did not intend to mislead the banks.

The district court had the benefit of reviewing the grand jury transcript and all of the evidence in the

possession of the government. Our review has been limited to the designated record which contains various pleadings, transcripts of hearings before the district court, and the defendant's deposition taken in the bankruptcy proceedings. The government claims that all relevant portions of this evidence were presented to the grand jury through the testimony of witnesses. In its brief, the government requests "this Court to review the grand jury transcripts . . . and satisfy itself of the accuracy of the government's position." Government's Response, April 5, 1989, at 9. However, the government did not designate the grand jury transcript as a part of the record before us. If we had the benefit of reviewing the grand jury transcript, our review of the deposition's exculpatory evidence may have lead to a different conclusion. Nevertheless, we conclude that the explanations regarding the classification of the notes as well as their valuation in the financial statements are consistent with the possible theory that defendants simply did not intend to mislead the banks. We cannot say that the district court's finding that the deposition contained exculpatory evidence was clearly erroneous.

B. Indictment

Having concluded that the government withheld substantial exculpatory material from the grand jury, we must now consider (1) whether the district court was correct in finding that defendant was prejudiced, and (2) whether the district court abused its discretion by dismissing the indictment.

1. *Prejudice to Defendant*

The purposes of the grand jury require it to be both independent and informed in order to render a

decision free from bias. *See Wood v. Georgia*, 370 U.S. 375, 390, 82 S.Ct. 1364, 1373, 8 L.Ed.2d 569 (1962). The grand jury serves to "clear the innocent, no less than to bring to trial those who may be guilty." *United States v. Dionisio*, 410 U.S. 1, 16-17, 93 S.Ct. 764, 773, 35 L.Ed.2d 67 (1973) (footnote omitted). The grand jury also acts as "a protector of citizens against arbitrary and oppressive governmental action." *United States v. Calandra*, 414 U.S. 338, 343, 94 S.Ct. 613, 617, 38 L.Ed.2d 561 (1974). "To be independent and informed, the grand jury must be able to obtain all relevant evidence, since only then can its judgment truly be informed." *United States v. Flomenhoft*, 714 F.2d 708, 711 (7th Cir.1983), *cert. denied*, 465 U.S. 1068, 104 S.Ct. 1420, 79 L.Ed.2d 745 (1984) (citations omitted).

Applying the above-quoted principles, we have held than an indictment can be dismissed only when prosecutorial misconduct results in "some significant infringement on the grand jury's ability to exercise independent judgment." *United States v. Pino*, 708 F.2d 523, 530 (10th Cir.1983). The Supreme Court recently held that "a District Court may not dismiss an indictment for errors in grand jury proceedings unless such errors prejudiced the defendants." *Bank of Nova Scotia v. United States*, 487 U.S. 250, 108 S.Ct. 2369, 2373, 101 L.Ed.2d 228 (1988). In *Nova Scotia*, the court announced the following standard that court should apply whenever dismissal is sought for a nonconstitutional error.

> The prejudicial inquiry must focus on whether any violations had an effect on the grand jury's decision to indict. If violations did substantially influence this decision, or if there is grave doubt that the decision to indict was free from such substantial influence, the violations cannot be deemed harmless.

Id. 108 S.Ct. at 2378. This standard was first articulated in *United States v. Mechanik*, 475 U.S. 66, 78, 106 S.Ct. 938, 945-46, 89 L.Ed.2d 50 (1986) (O'Connor, J., concurring), and was based on the decisions in *United States v. Lane*, 474 U.S. 438, 449, 106 S.Ct. 725, 732, 88 L.Ed.2d 814 (1986), and *Kotteakos v. United States*, 328 U.S. 750, 765, 66 S.Ct. 1239, 1248, 90 L.Ed. 1557 (1946). Although some errors or violations can be remedied at trial,[1] "where an unremedied violation is proved, the trial judge must still be satisfied that the violation resulted in grand jury intimidation or improper influence . . . and thus had a 'substantial influence' on the indictment returned, or that there is grave doubt as to whether it had such effect." *Mechanik*, 475 U.S. at 78, 106 S.Ct. at 946 (*citing Kotteakos*, 328 U.S. at 765, 66 S.Ct. 1248).

In the present case, the district court reviewed all the disputed evidence and concluded that the deposition, tax records, general ledgers and financial statements revealed a consistent format of reporting that "indicate[s] a lawful basis for the information Defendant provided to the banks, as opposed to any indication of intent to defraud those banks." Record, vol. 1, Doc. 85, Order, November 7, 1988, at 8. The government argues that the withheld evidence was adequately discussed before the grand jury and that

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[1] Earlier cases have held that some errors can be remedied at trial, and do not warrant a dismissal. *See, e.g., United States v. Page*, 808 F.2d 723, 727 (10th Cir. 1987); *Talamante v. Romero*, 620 F.2d 784, 790-91 (10th Cir. 1980), *cert. denied*, 449 U.S. 877, 101 S.Ct. 223, 66 L.Ed.2d 99 (1980) (perjured testimony before grand jury).

providing the material would have been a fruitless gesture. Further, the government argues that the grand jury "would not have known or understood the relevance of [the documents] without knowing the theory of the case." Government's Response, April 5, 1989, at 8. As we have already noted, the purpose of the grand jury is to render an unbiased, independent, and informed decision based on all relevant evidence. Consequently, the government's theory of the case is not critical. The finding of intent to commit a criminal act is a determination the grand jury must make in deciding whether probable cause exists. Here, the district court found that the failure to present evidence relevant to the critical issue of intent rendered the indictment suspect. We cannot say, based on our review of the record, that this finding was clearly erroneous.

2. *Dismissal Without Prejudice*

As a final matter, we must examine the propriety of the district court's dismissal of the indictment without prejudice. Our standard of review is to determine whether the district court abused its discretion. *See United States v. Strayer*, 846 F.2d 1262, 1265 (10th Cir.1988); *United States v. Derr*, 726 F.2d 617, 619 (10th Cir.1984). Based on the above review of the district court's findings, we conclude that the court did not abuse its discretion in granting defendant's motion to dismiss the indictment. Further, despite defendant's request for dismissal with prejudice, we hold that the district court was correct in dismissing the indictment without prejudice "so that the government can, . . . again, if it elects, present the matter to the grand jury for determination of probable cause." Record, vol. 6, at 5. The more

drastic remedy of dismissal with prejudice would not be justified under these circumstances.

III. CONCLUSION

After reviewing the record, we hold that the district court was not clearly erroneous when it found that the government withheld substantial exculpatory material from the grand jury. Based on this error by the government, the district court correctly found that the absence of the withheld evidence prejudiced defendant before the grand jury rendering the grand jury's indictment suspect. Consequently, the district court did not abuse its discretion when it granted defendant's motion to dismiss the indictment. Finally, we hold that under the circumstances, the district court properly dismissed the indictment without prejudice.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF OKLAHOMA

Case No. 88-CR-52-E

UNITED STATES OF AMERICA, PLAINTIFFS

vs.

JOHN H. WILLIAMS, JR., DEFENDANTS

ORDER

[Filed Oct. 14, 1988]

Now on this 14th day of October, 1988, this matter comes on for consideration by this Honorable Court and the Court, being fully advised in the premises finds that on October 3, 1988, Defendant John H. Williams moved to dismiss the indictment on the grounds that the prosecutor failed to disclose exculpatory evidence to the Grand Jury. The government filed its response on October 6, 1988, to which the Defendant replied on October 12, 1988.

This Court has carefully reviewed all the supporting documentation filed by Defendant in his appendices which contained, *inter alia*, Defendant's deposition taken in a bankruptcy adversary proceeding and several documents which the government delivered in connection with its responsibilities under *Brady v. Maryland*, 373 U.S. 83 (1963). In addition, this

Court has similarly carefully reviewed the unedited transcripts of testimony taken before the Grand Jury prior to indictment.

The Court has examined the pertinent authorities in this area, most notably *United States v. Page*, 808 F.2d 723 (10th Cir. 1987), *cert. denied*, 107 S.Ct. 3195 (1987) and *United States v. Kilpatrick*, 821 F.2d 1456 (10th Cir. 1987). Applying the standards delineated therein, the Court finds that there has been no substantial exclusion of exculpatory evidence from the purview of the Grand Jury. Granted, individual items of potentially exclusionary evidence such as Defendant's tax returns and opinions of the Defendant's friends and business associates regarding his business judgment as related to the issue of intent were not presented to the Grand Jury but the *Page* standard does not oblige the prosecutor to "ferret out and present every bit of potentially exculpatory evidence." *United States v. Page, supra*, at 728.

Based upon this Court's examination of all documents presented and authorities cited regarding this matter, and in conjunction with the Court's adherence to the standards of prosecutorial divulgement as set forth in *Page, supra*, the Court finds that Defendant Williams' Motion to Dismiss Indictment must be denied.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendant Williams' Motion to Dismiss Indictment should be and is hereby denied.

IT IS FURTHER ORERED, ADJUDGED AND DECREED that the unedited transcripts of Grand Jury testimony presented to the Court for *in camera* review do not contain substantial exculpatory evidence such that disclosure of the entire transcripts,

in addition to the edited transcripts already provided to Defendant and his counsel, must be made. The unedited transcripts will therefore remain with the Court.

FINALLY, IT IS FURTHER ORDERED, ADJUDGED AND DECREED that, Defendant's counsel having made a satisfactory response to the government's Motion to Inquire of Defendant's Counsel with regard to his possible conflict of interest, no further inquiry will be made by this Court.

/s/ James O. Ellison
JUDGE JAMES O. ELLISON
United States District Court
Northern District of Oklahoma

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF OKLAHOMA

No. 88-CR-52-E

UNITED STATES OF AMERICA, PLAINTIFF

vs.

JOHN H. WILLIAMS, JR., DEFENDANT

ORDER

[Filed Nov. 7, 1988]

This matter comes before the Court in the posture of a motion for reconsideration. The Defendant, John H. Williams, Jr., moved the Court on October 3, 1988 for dismissal of the indictment on the grounds that the government withheld substantial exculpatory information in its possession from the grand jury. The Court denied the motion in an order filed October 14, 1988. Defendant moved the Court to reconsider its order on October 17, 1988. The Court heard extensive argument and again reviewed the evidence on October 18, 1988. The Court held at the conclusion of the hearing that the evidence withheld by the government was substantial exculpatory information and that on account of the government's

failure to present this to the grand jury the indictment should be dismissed without prejudice.

Williams was indicted by a grand jury on May 4, 1988 for the alleged violation of 18 U.S.C. § 1014. Section 1014 makes it a crime for someone to knowingly make a false statement concerning a material fact to a financial institution for the purpose of influencing the financial institution's action. The indictment contains seven separate counts involving original and renewal loan requests made by Williams to four federally insured banking institutions within this judicial district. In substance the seven counts together allege that Defendant knowingly overvalued his current assets to obtain approvals and renewals of various loans. With the exception of Count 2, which involves oral statements allegedly made to a bank, all of the offenses charged by the government allege that these overvaluations were made by Williams in his financial statements, income statements, or projected income statements. These alleged overvaluations concern the stated value for income (including interest income), collateral and notes receivable.

Defendant contends that the government failed to present substantial exculpatory evidence in its possession to the grand jury, and as a result the indictment should be dismissed. In agreeing with the Defendant, the Court is guided by the standard of dismissal recently articulated by the United States Supreme Court in *Bank of Nova Scotia v. United States*, —— U.S. ——, 108 S.Ct. 2369 (1988), and by the decisions of this Circuit regarding exculpatory evidence.

In *Nova Scotia* the Supreme Court addressed the issue of the prejudice that must be shown as a predi-

cate to the district court's exercise of its supervisory powers to dismiss an indictment on the basis of prosecutorial misconduct. The court affirmed a decision by the United States Court of Appeals for the Tenth Circuit in *United States v. Kilpatrick*, 821 F.2d 1456 (1987), that the prosecutorial misconduct in that case was insufficient to warrant dismissal of the indictment. Initially the Court examined the "standard of prejudice" to be applied by district courts when a defendant requests dismissal of the indictment before trial. The Court stated that when dismissal is sought for non-constitutional error it would adopt the standard articulated by Justice O'Connor in her concurring opinion in *United States v. Mechanik*, 475 U.S. 66, 106 S.Ct. 938 (1986). Justice Kennedy stated:

> Under this standard, dismissal of the indictment is appropriate only 'if it is established that the violation substantially influenced the grand jury's decision to indict' or if there is 'grave doubt' that the decision to indict was free from substantial influence of such violations.

—— U.S. at ——, 108 S.Ct. at 2374.

The conduct at issue in *Nova Scotia* was alleged misuse of IRS agents in violation of Fed.R.Crim.P. 6(d), the treatment of witnesses, the grant of "pocket immunity" to certain witnesses, and the defendant's claim that summaries used by IRS agents before the grand jury were inaccurate. The court found that the conduct, considered either separately or cumulatively, failed to "raise a substantial question, much less a grave doubt as to whether [the conduct] had a substantial effect on the grand jury's decision to charge". —— U.S. at ——, 108 S.Ct.

2378. Addressing each instance of alleged misconduct in turn, the Court found that either the conduct could not have substantially affected the grand jury's decision, or that the district court record failed to support the allegation of prosecutorial misconduct. The Court also noted two points: (1) that the instances of alleged misconduct occurred as "isolated episodes in the course of a twenty-month investigation, an investigation involving dozens of witnesses and thousands of documents", *Id.*; and (2) that the type of errors alleged could be remedied by means other than dismissal, such as contempt of court or disciplinary proceedings, *Id.*

Nova Scotia did not involve a prosecutor's decision to withhold exculpatory evidence from the grand jury. This conduct has been addressed by the Tenth Circuit in *United States v. Page*, 808 F.2d 723, *cert. denied*, 107 S.Ct. 3195 (1987). *Page* presented the appeal of a conviction for racketeering activities. One of the issues on appeal concerned the extent of a prosecutor's duty to discover and present exculpatory evidence to the grand jury. The Court initially noted that other courts have ruled that a prosecutor owes no duty to present exculpatory evidence to a grand jury. The *Page* court, however, explicitly rejected those decisions and adopted the rule that when substantial exculpatory evidence is discovered in the course of an investigation, it must be revealed to the grand jury, although the prosecutor is "not obliged to ferret out and present every bit of potentially exculpatory evidence", 808 F.2d at 728. The Court reasoned that "[t]his rule promotes judicial economy. If a fully informed grand jury cannot find probable cause to indict, there is little chance the prosecution

could have proved guilt beyond a reasonable doubt to a fully informed petit jury." *Id.*[1]

The *Nova Scotia* standard for dismissal, when considered against a prosecutor's duty to disclose substantial exculpatory evidence, compels dismissal of the indictment in this case. From a review of the evidence withheld from the grand jury the court concludes that the prosecution had substantial exculpatory evidence in its possession, which the prosecutor had a duty to present to the grand jury, and that the absence of this evidence substantially influenced the grand jury's decision to indict.

The evidence withheld falls generally into two categories: (1) written material generated in the bankruptcy proceedings involving Defendant and his wife.[2] This material included Defendant's deposition in bankruptcy adversary proceedings in which he explains his balance sheet, income statement, the method of their preparation, and his beliefs regarding the asset values assigned, as well as a discussion by the Defendant of his venture capital investments and statements made to bankers regarding those investments; and (2) financial statements, tax records, and general records of the Defendant prepared by Defendant and his accounting firm over a period of years.[3] This evidence is relevant to an essential ele-

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[1] The rationale behind this rule has also been stated as promoting the mission of the grand jury "to clear the innocent, no less than to bring to trial those who may be guilty." *United States v. Phillips Petroleum Company*, 435 F.Supp. 610, 618 (N.D. Okla. 1977).

[2] In re: John H. Williams, Jr. and Carol S. Williams, Case No. 86-00475, United States Bankruptcy Court for the Northern District of Oklahoma.

[3] Defendant contends that government interviews of various persons including Defendant's brother, a financial con-

ment of the crime charged, the issue of Defendant's intent to make materially false statements upon which the banks would rely. The evidence also is substantially exculpatory on the issue of intent when the evidence is examined as a whole. "Exculpatory evidence" has been defined as "evidence which creates a reasonable doubt about the Defendant's guilt". *United States v. Gray*, 502 F.Supp. 150, 152 (D.C. D.C. 1980).

With regard to the written material generated in the bankruptcy adversary proceedings, the court notes that Defendant was subpoenaed by the grand jury but only to produce documents. The government obtained documents subpoenaed and others from the trustee in bankruptcy or his counsel. Defendant was not asked to testify before the grand jury. An examination of Defendant's deposition and the exhibits to the deposition reveals substantial exculpatory material. The Defendant explains his balance sheets and income statements in detail, the method of their preparation, and his beliefs with regard to the asset values assigned. The deposition also contains significant discussion by Defendant of his venture capital investments and statements made to bankers regarding those investments. Without the benefit of Defendant's testimony before the grand jury this written material would be highly useful to the grand jury in evaluating Defendant's intent. For example,

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sultant engaged by Defendant, a principal of a venture capital firm in which Defendant invested, and an official of a bank with which Defendant did business are relevant to Defendant's state of mind in that those interviews reveal Defendant's faith in the ultimate success of his venture capital investments. The Court finds however that this evidence is not substantially exculpatory and that other evidence withheld is more relevant to Defendant's state of mind.

a primary contention of the government is that Defendant overvalued notes receivable from venture capital companies in which he had heavily invested, that is, that Defendant knew the notes receivable from these companies were substantially overvalued or worthless. Defendant's deposition, though, contains a discussion of his experience with venture capital investments, and particularly, with the Lexel Corporation. Defendant invested over $500,000 in Lexel and guaranteed substantial Lexel bank debt between 1973 and 1978. Lexel had negative capital for several years and could not pay interest in accordance with the terms of its note. In 1983 Defendant sold his investment in Lexel for over $4,500,000. Defendant's experience with venture capital investments raises doubt about Defendant's intent to defraud the banks when he listed notes receivable from such companies at face value.

With regard to Defendant's financial records, the government knew that Defendant's financial statements had been prepared since 1975, on at least a semi-annual basis, with the assistance of the Horter Company and knew of the procedures and formats used by the Defendant and Horter in preparing these statements. Horter also maintained Defendant's general ledger and participated in the preparation of Defendant's tax returns. This material was in the possession of the government. The statements as to income and expense on the financial statements at issue in the indictment were drawn from these ledgers, which were also used to prepare Defendant's tax returns. This written material reveals a consistent format of reporting over a period of years and consistency in the figures reported from form to form. If the government had presented to the

grand jury this information within its possession, the grand jury would have been aware that the Defendant's inclusion of interest income on the financial statements at issue was consistent with the general ledgers maintained by Horter with Defendant's federal income tax returns and with Defendant's bank statements. Likewise, the grand jury would have been aware that the Defendant, with the assistance of Horter, presented figures as to note balances which comprised the notes receivable portion of the financial statements that were consistent with the face value of the notes on the general ledgers. The tax records, general ledgers and statements are evidence which would indicate a lawful basis for the information Defendant provided to the banks, as opposed to any indication of intent to defraud those banks.

In short, the government had in its possession substantial exculpatory information that would have assisted the grand jury in fairly evaluating intent within the context of all the relevant evidence. The information withheld raises reasonable doubt about the Defendant's intent to defraud. The absence of this substantial exculpatory evidence on perhaps the most crucial element of the crime charged renders the grand jury's decision to indict gravely suspect.

IT IS THEREFORE ORDERED that the indictment in this case is dismissed without prejudice.

ORDERED this 4th day of November, 1988.

/s/ James O. Ellison
JAMES O. ELLISON
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Nos. 88-2827
88-2843

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLANT/CROSS-APPELLEE

v.

JOHN H. WILLIAMS, JR.,
DEFENDANT-APPELLEE/CROSS-APPELLANT

ORDER

Filed April 22, 1991

Before HOLLOWAY, Chief Judge, McKAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, and EBEL, Circuit Judges.

The court has considered appellant/cross-appellee's petition for rehearing and the appellee/cross-appellant's petition for rehearing and suggestion for rehearing en banc, together with the briefs, memoranda, and the supplemental sealed record on appeal.

Appellant/cross-appellee's petition for rehearing is denied by the panel to whom it was submitted.

Appellee/cross-appellant's petition for rehearing is denied by the panel to whom it was submitted. In accordance with Rule 35(b) of the Federal Rules of Appellate Procedure, the petition for rehearing and suggestion for rehearing en banc were transmitted to all the judges of the court in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Appellee/cross-appellant's motion for access to the sealed portions of the record, Supplemental Volume I, is denied.

Entered for the Court

/s/ Robert L. Hoecker
ROBERT L. HOECKER
Clerk

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